Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

JOHN L. SALAZAR- PETITIONER
(John L. Salazar)

Vs.

TIM LEMASTER Attorney General of New Mexico-
RESPONDENTS

ON PETITION FOR A WRITE OF CERTIORARI
TO

TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

John L. Salazar

1600 Escalante S.W.

Albuquerque, New Mexico, 87104
(505) 247-8370

QUESTIONS PRESENTED

1. Why the 10th Cir. did not consider that Petitioner is entitled to Equitable tolling because of petitioner's lawyer's negligence as well as the prison officials misconduct preventing him from filing timelier? Thus, the District Court as well as the 10th Circuit has miss-calculated the days for equitable tolling purposes, because they have not considered the above or misapplied it?

2. Why the 10th Cir. did not consider that Petitioner has discovered new evidence of Innocence as of December 2003, asked in his petition if he could leave to amend his petition, but the 10th circuit has never addressed this issue? Rule 60 (b) should apply here? (Differing form Other Circuits) Petitioner has Newly discovered evidence of Innocence that non of the courts have seen and should be allowed to leave to file either a State Habeas or remain in Federal Court to review the same? (See, other Circuits and Supreme Court Rulings.) Also it did not notify Petitioner that it was converting from a Motion to Dismiss into a Motion for Summary Judgment See F.R.C.P. 56.

3. The 10th Circuit on December 10, 2003 determined that the 2254 Petition filed in August 2003 does not constitute an unauthorized second or successive Petition, thus, this is the same petition filed early on and Rule 60(b) should allow this Petition to continue?

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRTI OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the United States court of appeals for the 10th Circuit appears at Appendix **A** to the petition and is unpublished.

The opinion of the United States District Court For the District of New Mexico appears at Appendix **B** to the petition and is unpublished.

The opinion of the United States Magistrate For the District of New Mexico appears at Appendix **C** to the petition and is unpublished.

The opinion of the Second Judicial District Court for the District Of New Mexico appears at Appendix **D** to the petition and is unpublished.

JURISDICTION

The Date on which the United States Court of Appeals For the 10th Circuit decided my case was March 3, 2005.

No petition for rehearing was timely filed in my case.

The Jurisdiction of this Court is invoked under 28 U.S.C. s 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 10th Circuit has stated that " Under the 'contrary to' clause of habeas statute, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law of if the state court decides a case differently that the Supreme Court has on a set of materially indistinguishable facts." 28 U.S.C.A. s 2254(d) -*McGregor v. Gibson, 219 F.3d 1245 (Okla. 10th Cir. 2000).* The 10th Cir. clearly did not rely on their own opinions on this matter.

Recently in *Crews v. Horn, 360 F.3d 146 (3rd Cir. Mar. 4. 2004),* the Court of Appeals changed the procedure in this Circuit. Considering a timely federal habeas petition containing both exhausted and unexhausted claims dismissed by the district court had dismissed, and finding there was a substantial danger Crews would be time-barred from returning to federal court (because his petition would be filed after the expiration of the limitations period and it was unclear whether tolling would apply), the court held:

"[HN9] district courts have the discretion to stay mixed habeas corpus petitions but that, as in this case, when an outright dismissal could jeopardize the timeliness of collateral [811] attack, a stay is the only appropriate course of action."[HN6] In the Third Circuit, if a Fed. R. Civ. P. 60(b) Motion challenges the federal habeas preceding itself, rather than the underlying conviction; it can proceed as a motion

under rule 60(b) and not as a successive habeas. Also, See *Alloway v. Jordan 69 Fed. Apex. 431, (10th Cir. 2003)* (Remand and allow court to notify parties intent to convert from... dismiss to... summary... rule 56. Because Petitioners Motion/Writ of newly discovered evidence on innocence now computed and found was not filed within 10 days of the district court's entry of judgment, Petitioners motion is cognizable only as a motion for relief from judgment pursuant to *Fed. R. Civ. P. 60(b)*. See *Computerized Therma Imaging. Inc. v. Bloomberg, L.P., 312 F.3d 1292, 1296 n.3 (10th Cir. 2002).*

Petitioner can now file a motion pursuant to *Fed. R. Civ.P. 60(b)* or/and file a new state petition for habeas corpus because the court did not consider that petitioner was compiling this evidence since December 2003 and because petitioner's case is a complicated Fraud case, finished the investigation on March of 2005.

STATEMENT OF THE CASE

1. That Petitioner is entitled to Equitable tolling because of petitioner's lawyer's negligence as well as the prison officials misconduct preventing him from properly filing. Mr. Nelson, Salazar's Lawyer was negligent in preparing the state habeas petition, claimed that he mailed it to plaintiff and did not and after plaintiff did receive a copy the prison returned one back to Mr. Nelson lost a second and when a third was hand delivered the prison prevented and delayed Petitioner from obtaining a notary. This caused tremendous delay, because of Nelson's broken

promises and the prison officials misconduct causing the State Habeas not to be filed until December 6, 2000. The 10th Cir. has stated, "Equitable tolling would be appropriate... when a prisoner is actually innocent or when an adversary conduct- or other uncontrollable circumstances prevents a prisoner [*5] from timely filing." See *Gibson v. Klinger, 232 F.3d 799-808, (10th Cir. 2000) and Slack vs. McDaniel, 529 U.S. 473, 478 (2000). See also Davis v. Artuz 2003 U.S. Dist LEXIS 17392 (S.D.N.Y.)* and *Gitten v. United States of America 311 F. 3d 529; (2nd Cir. 2002).* Because this was the case in petitioner's case, it entitles Petitioner to equitably tolling and would add ten **(10)** more months beyond the 28 days left to file within the year. This would add 275 days during the pendency of Petitioner's State Habeas. This would make Petitioners Federal habeas CIV 01-1206 WPJ/LFG due Approximately on 10/12, 2002. Petitioner filed his Federal habeas 10/19/ 2001, almost a year before this due date. He was not late and filed his addendum May 3, 2002, five months before the due date and his Supplement was filed 10/21/ 2002 claiming new evidence of innocence was found during a Bankruptcy Trial in 2002 and discover was continuing. Petitioner gave respondents fair notice. *Fed. Rule Civ. Pro 15 (c).* The "standard for determining whether a claim arises out of the same conduct or occurrence, is whether pleading gave the respondent fair warning..." *Fama, 253 L.Ed at 815.* The District Court as well as The 10th Circuit has miss-calculated the days for equitable tolling purposes. See *Mayche v. Muskogee Medical Center Aux. 129 f. 3d 131, 1997 WL 698007 at *2 (10th Cir.*

Nov. 6, 1997 up holding 15(c)(3) Standard. The state failed to show prejudice. The 15(c)(3) standard in prejudice is in defending on merits, not just in having to defend claim outside limited period. Petitioner Case has never been heard on it merits. *See also Servants of the Paraclete v. doe, 204 F.3d 1005 (10th Cir. 2000) and White v. American Airlines, Inc. 915 F.2d 1414, 1425 (10th Cir. 1990) York v. Galetko, 314 F. 3d 552, 527 (10th Cir. 2003) Also see the Supreme Court ruling in Shlup v. Delo, 513 U.S. 324, 130 Ed. 808,115 S. Ct. 851 (1995).*

2. That Petitioner has discovered new evidence of Innocence beginning as of December 2003,mentioned in Habeas and appeal and now all accounting calculations were finished as of March 2005, asked in his petition if he could leave to amend his petition, but this issues has never been addressed. *Rule 60 (b)* should apply here. It must be noted that Petitioners case is a complicated fraud case. The more relevant Discovery has been kept from Plaintiff by Prison Authorities until his release from prison on 11/17/04. Petitioner has Newly discovered evidence of Innocence that non of the courts have seen and should be allowed to leave to file either a State Habeas or remain in Federal Court to review the same. (See other Circuits and Supreme Court Rulings). Recently in *Crews v. Horn, 360 F.3d 146 (3d Cir. Mar. 4, 2004),* the Court of Appeals changed the procedure in this Circuit. Considering a timely federal habeas petition containing both exhausted and unexhausted claims dismissed by the district court had dismissed, and finding there was a substantial danger *Crews* would be time-barred from returning to federal court (because

his petition would be filed after the expiration of the limitations period and it was unclear whether tolling would apply), the court held: "[HN9] district courts have the discretion to stay mixed habeas corpus petitions but that, as in this case, when an outright dismissal could jeopardize the timelines of collateral attack, a stay is the only appropriate course of action." See also *Johnson v. Lehman 2000 U.S. Dist LEXIS 11221, (June 15, 2004, Decided).* This is precisely similar to Petitioners case. Also see the Supreme Court case in *Adbur'Rahman v. Bell, 535 U.S. 1016, 122 S.Ct. 1605, 152 L.Ed. 2d 620, (2002) also see Mahoney v. Walter s. Ray 326 F.3d 1176; 2003 U.S. App. LEXIS 6344(11th Cir. 2003.*

3. The 10th Circuit on December 10, 2003 determined that the *2254* Petition filed in August 2003 does not constitute an unauthorized second or successive Petition, thus, this is the same petition filed early. Petitioner now, because of this new ruling has filed a motion under *Rule 60(b)* and a State Writ of habeas Corpus in order to vacate the decision to deny his *2254* Writ of Habeas Corpus. Petitioner has Asserted both what arguable were grounds for challenging the correctness of the denial of his section *2254* petition and what arguably were new grounds for challenging his conviction. In *Rodriquez V. Mitchell, 252 F.3d 191 (2d Cir. 2001), amended, F.3d (2d Cir. 2002).* Rodriquez held that a rule *60(b)* motion challenging [**4] the "integrity' of a collateral attack proceeding should not be treated as a second collateral attack on a conviction, even though the motion ultimately seeks to overturn the conviction. *Id at 198-*

200. In suggesting that Rodriquez "settled the issue by ruling that a *60(b)* motion should never be treated as a second or successive motion, See *Kellogg v. Stack, 269 F.3d 100, 102-03, n.2 (2d Cir. 2001*). Also see 5th cir case in *Wilson v. Thompson, 638 F. 2d 801, 803 (5th Cir. 1981).* Even if this ruling will only allow Petitioners rule *60(b)* motions with grounds that "relate the integrity of the federal habeas proceeding as not a Second or successive petition, then the second or successive petition should be allowed as it relates to the integrity of the underlying conviction. Though the 10th Circuit upheld the dismissal and " although permissible, the district court must first notify the parties of the conversation and provide and opportunity to present all materials pertinent to such motion Under Sed Rules of Civ. Procedure 56." See *Brown v. Zavaras 63 F. 3d 967, 969 (10th Cir. 1995).* The Respondent along with their answer filed a motion to dismiss and the court granted. In other words, the district Court effectively converted Respondent Motion to Dismiss into a Motion for Summary Judgment. The 10th Circuit will not even follow its own rulings in petitioner case when it has ruled differently in similar cases. They only seem to adopt what the other courts are stating. Not responding to Petitioner's developing new Evidence of innocence from discovery requests, that even today the courts have not seen. Not considering whether he had permission to stay or should the court stay the petition, In Re *Crews*. Has not addressed the merits of the case including the fact that jail guards beat petitioner, just to coerce a plea, ineffective assistance of counsel etc. The retaining of jurisdiction over the petition and

staying further proceeding pending the exhaustion of state remedies was not examined. Petitioner1 should be allowed to eventually overturn his conviction because of innocence. Petitioner's Claims present a cognizable public interest and is now at stake, because of a manifest injustice, and a miscarriage of justice. There seems to be a lot on confusion as to what the circuits state about all of these issues. Also the magistrate Judge Deaton at the time he gave his opinion did not give petitioner all three options required by *Duncan*. He only gave two of the options. The one option he did not inform Petitioner of was option three. The magistrate or the district court's option suggested by Justice Stevens' opinion in *Duncan*, of retaining jurisdiction over the petition and staying further proceedings pending the exhaustion of state remedies, they did apparently not examine this third option. In light of *Crews* further clarification should come form the Supreme Court on all of the issues Petitioner has raise at this time.

1 Petitioner has relied on *28 U.S.C.S. 2244(D)(1), 28 U.S.C.S. 2244(b)(3)(A), 28 U.S.C.S. 2244(b), Fed. R. Civ. P. 11,FRCP 15 FRCP 15 (c), Fed. R. Civ. P. 60 (b)(6), Fed. R. Civ. P. 60* to help formulate his Statement of the case. Petitioner has also relied on other circuits and the supreme court in support of petitioners claims, including but not limited to *Crews v. Horn, 360 F.3d 146 (3d Cir. Mar. 4, 2004), Rodriquez V. Mitchell, 252 F.3d 191 (2d Cir. 2001), amended, F.3d (2d Cir. 2002), Kellogg v. Stack, 269 F.3d 100, 102-03, n.2 (2d Cir. 2001), Shlup v. Delo, 513 U.S. 324, 130 Ed. 808, 115 S. Ct. 851 (1995), Adbur'Rahman v. Bell, 535 U.S. 1016, 122 S.Ct. 1605, 152 L.Ed. 2d 620, (2002) also see Mahoney v. Walter s. Ray 326 F.3d 1176; 2003 U.S. App. LEXIS 6344(11th Cir. 2003).* It would truly be a manifest injustice not to allow the newly discovered evidence that has been withheld from petitioner by State official for 7 years. See Rule 56 in re *Brown*

REASONS FOR GRANTING THE PETITION

In light of the 10th Cir. Citation, "Equitable tolling would be appropriate... when a prisoner is actually innocent or when an adversary conduct- or other uncontrollable circumstances prevents a prisoner [*5] from timely filing." See *Gibson v. Klinger, 232 F.3d 799-808, (10th Cir. 2000) and Slack vs. McDaniel, 529 U.S. 473, 478 (2000).*

Further, in light of the tenth Circuit ruling in *Mayche v. Muskogee Medical Center Aux. 129 f. 3d 131, 1997 WL 698007 at *2 (10th Cir. Nov. 6, 1997 up holding 15(c)(3) Standard.* Petitioner is entitled to relief from the final judgment.

And, In light of *Crews v. Horn, 360 F. 3d 146 (3d Cir. Mar. 4, 2004),* and Petitioners reliance on the express instructions of this Court, Petitioner is entitled to relief from the final judgment. See Rule 60(b).

Also, in light of supreme court rulings *Shlup v. Delo, 513 U.S. 324, 130 Ed. 808, 115 S. Ct. 851 (1995), Adbur'Rahman v. Bell, 535 U.S. 1016, 122 S.Ct. 1605, 152 L.Ed. 2d 620, (2002),* Petitioner is entitled to relief from the final judgment. See Rule 56. in Re. *Brown.*

CONCLUSION

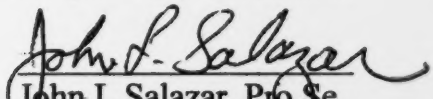
For the foregoing reasons, Petitioner's Claims for relief under *Fed. R. Civ. P. 15 and R.Civ. P. 15 (c)* should be granted. As the U. S. Direct Court and the 10th Circuit Court of Appeals previously reviewed this action and the case should be referred back to the appropriate court for consideration of the merits of the

Petitioner's claims.

Also, for the foregoing reasons, Petitioner's Claims for relief under Fed. R. Civ. P. 60(b) and F.R.C.P 56 should be granted. As the action was previously reviewed by the District Court and the 10th Circuit Court of appeals and the case should be referred back to the appropriate court for consideration of the merits of the Petitioner's claims.

Further, for the sake of new evidence not yet seen by the courts that clearly show evidence of innocence and this case should be referred back to the appropriate court for consideration of the merits of the Petitioner's claims. Thus, the petition for a writ of certiorari should be granted, because society has an interest, the circuits are unsettled on the foregoing, there is confusion and the Supreme Court can clarify these issues.

Respectfully submitted,



John L Salazar, Pro Se
1600 Escalante S.W.
Albuquerque, New Mexico 87103

May 20, 2005

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United states Court
Court of Appeals
Mar 3. 2005
PATRICK FISHER
Clerk

JOHN LESTER SALAZAR
Petitioner-Appellant.

v. No. 04-2252

TIM LEMASTER, warden, D.C. No. CIV-03-1010 JH/KBM
New Mexico State Penitenitary; and
Attorney General For the State
Of New Mexico

ORDER

Before EBEL, McKAY and HENRY, Circuit Judges.

Petitioner-Appellant John Lester Salazar moves for a Certificate of Appealability ("COA"), pursuant to 28 U.S.C. 2253(C), AS TO HIS 28 U.S.C. 2254 Petition for habeas relief. We DENY the COA because Salazar's 2254 petition is time-barred and DISMISS Salazar's appeal.

(e.g. Appendix A.)

I. Salazar's Noncompliance with the AEPA Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA') sets a one-year statute of limitations for the filing of federal habeas petitions. 28 U.S.C. 2244 (d)(1). The Statute of limitations is subject to certain tolling provisions. 28 U.S.C. 2244(d)(2). To calculate whether the statute of limitations expired before Salazar filed this petition for federal habeas relief, we must examine the history of Salazar's Attempts to challenge his New Mexico State court conviction and sentence.

The State Court announced Salazar's Sentence at a hearing on July 21, 1999. (Aplt. App. At 148.) Although Salazar had waived the right to appeal his conviction as part of a pleas agreement, (exh. A. Attach G.), Salazar's attorney did file a "Motion to Reconsider Sentence." (Exh. A. Attach I), and entered an amended final judgment and sentence on august 11, 1999.[1] (Aplt. App. At 148.)

Salazar's counsel appealed the denial of the motion. This appeal was finally resolved by a state panel's decision, which was issued on March 2, 2000. Exh. A. Attch X.)

On December 6, 200), another attorney filed a petition on Salazar's behalf seeking state habeas relief. Aplt. App. At 165.) A state court denied this petition,

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1 As the magistrate judge below noted in her July 29, 2004 Proposed Finding and Recommended Disposition, this August 11 judgment clarified, but did not substantively change, the terms of an earlier judgment entered after the July announcement of sentence. (Aplt. App. At 712.)

and the New Mexico Supreme Court denied Salazar's petition for certiorari on September 7, 2001. (Aplt. App. At 213.)

Salazar then pursued habeas relief in federal court pro se using a petition filed on October 19, 2001. (Aplt. App. At 214.). The District court found that the petition contained both exhausted and unexhausted claims, and gave Salazar the opinion-prescribed by the Supreme Court in Rose v. Lundy, 455 U.S. 509, 533 (1982) of proceeding after dropping the unexhausted claims or acquiescing to the dismissal of the mixed petition so that he could return to state court to exhaust those claims. Salazar failed to unequivocally withdraw the unexhausted claims, and the district court dismissed Salazar's petition without prejudice on March 7, 2003. (Aplt. App. At 573.) Salazar filed a motion for reconsideration and a notice of Appeal, (Exh. S,T.), and in April 2003 the district court requested that we remand the case so that it could grant the motion, dismiss Salazar's unexhausted claims, and consider Salazar's exhausted claims. (Exh. V.)

However, Salazar had in fact already returned to state court to pursue the unexhausted claims, filing a petition for habeas relief on those claims as of March 27, 2003. 9Aplt. App. At 584.) Salazar then filed a petition for certiorari with the New Mexico Supreme Court on August 7, 2003, (Aplt. App. At 638), which the court denied on August 14, 2003. 9Aplt. App. At 637.) Salazar also filed a motion for reconsideration with the state district court on September 3, 2003, which the court denied on September 17, 2003. (Exh. N.M. NN.)

On July 18, 2003, Salazar notified the federal district court that he did not which to withdraw his unexhausted claims after all. 9Aplt. App. At 576.) The federal district court withdrew its request hat we remand the action, and we denied Salazar a COA on his firs federal habeas Petition on January 20, 2004. (Exh. DD.)

Salazar filed a second petition seeking habeas relief in federal district court on August 29, 2003. (Aplt. App. At 659.) this second petition is the subject of the instant case.

For substantially the reasons stated by the magistrate judge in her July 29, 2004 proposed Findings and Recommended disposition, we believe that Salazar's second federal habeas petition was untimely filed, and therefore barred. 9Aplt. App. At 712.) As the magistrate judge noted, even taking account of the periods during which he running of the statute of limitations was tolled under 2244(d)(2), the state of limitation had expired over a uer before Salazar was given the option in February 2003 of returning to state court to exhaust the unexhausted claims set forth in his first federal petition or dropping those claims.[2]

---

2 We need not address Salazar's contention that the district court should have simply stayed its consideration of the exhausted in Salazar's Mixed petition in February 2003, giving Salazar the chance to exhaust his other claims in state court and then add those claims to his federal petition. After all, the (cont...

Thus, the statute of limitations expired long before Salazar filed his second federal petition in August 2003.

II. Equitable Tolling

Salazar argues that any noncompliance with the statute of limitations should be excused in this case because (1) the actions of his attorney and a prison litigation coordinator delayed the filing of his state habeas petition; (2) newly discovered evidence proves his actual innocence.

As we noted in Gibson v. Klinger, 232 F. 3d 799 (10 Cir. 2000): AEDPA's one-year statute of limitations is subject to equitable tolling but only "in rare and exceptional circumstances." Equitable tolling would be appropriate, for example, when a prisoner is actually innocent, when an adversary's conduct- or other uncontrollable circumstances-prevents a prisoner from

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2 (continued)
Statute of limitation had already expired, and Salazar would have been barred from amending the federal petition to add more claims are they were exhausted.
Salazar may contend that a magistrate judge gave him "bad advice" in February 2003 by suggesting to him the option of returning to state court to pursue his unexhausted claims. However, the magistrate judge specifically advised Salazar that "the one-year statute of limitation still applied to all of the claims in this petition, including those that have been exhausted." (Exh J.). Moreover, "[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure'" and " ' the Constitution [does not] require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.'" Pliler v. Ford, 124 S.Ct. 2441, 2446 92004) (quoting McKaskle v. Wiggins, 465 U.S. 168, 183-184, (1984)). (timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period. Simply excusable neglect is not sufficient.)

Id. At 808 (internal citation omitted). For substantially the reasons stated by the district court judge in her September 10, 2004 Order. We believe that Salazar's noncompliance with the AEDPA'S statute of limitations should not be excused in this case. (Aplt. App. At 756.) As the district court judge noted, because counsel is not required in post-conviction proceedings, any miscalculation or inaction on the part of counsel or a prison litigation coordinator cannot constitute grounds to toll the statute. See March v. Soares, 223 F. 3d 1217, 1220 (10th Cir. 2000); Weibley v. Kaiser, 50 Fed. Appx 399, 403 910th cir. 2002). [3] Moreover, Salazar has failed to proffer new evidence, not present in the trial, that makes it "more likely than not that no reasonable juror" would have convicted him. Schlup v. Delo, 513 U.S. 298, 327 (1995).

Therefore, we DENY Salazar a COA because his 2254 petition is time barred and DISMISS his appeal.

ENTERED FOR THE COURT

S/_____
David M. Ebel
Circuit Judge

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[3] We cite this unpublished order and judgment in accordance with 10th Cir. R. 36.3(B).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
United States District Court
Albuquerque, New Mexico
SEP 10, 2004

JOHN L. SALAZAR,
Petitioner,

Vs

Civ 03-1010 JH/KBM

TIM LeMASTER, et al.,
Respondents

ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

On July 29, 2004, the magistrate Judge recommended that John Salazar's second 2254 petition be dismissed as untimely, and gave him additional time in which to file his objections to set forth any grounds for equitable tolling. *Doc. 27*. Petitioner timely filed objections, *See Docs. 28 &29*, along with a motion that asserts that his first petition should have been stayed rather that dismissed, *See doc. 30*. He also provided this Court with copies of a writ of mandamus filed in the United States Court of Appeals for the Tenth Circuit that raises the same arguments.

Petitioner raises two grounds for equitable tolling, neither of which is availing. Equitable tolling is available in only in "rare' circumstances such as when a prisoner is actually innocent or when failure to timely file was caused by extraordinary circumstances beyond his control." *March v. Soars, 223 F.3d 1217, 1220 (10th Cir. 2000), cert denied, 531 U.S. 1194*

(e.g. Appendix B.)

(2001); also e.g., Gibson V. Klinger, 232 F.3d 799, 808 (10th. 2000).

First, Salazar contends that his first habeas petition was delayed by ten months because his attorney and prison officials broke "promises," and that this misconduct "caused the delay to the State Habeas in December 6, 2000." Doc. 29 at 3; *See also Doc. 28 at 2.* However, equitable tolling is concerned with Petitioner's own diligence, and his allegations show a glaring absence of the requisite diligence on his part. *e.g. Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. Denied, 525 U.S. 891 (1998).* More importantly, because counsel or inmate assistants cannot constitute grounds to toll the statute. *See e.g. Gibson, 232 F.3d at 808; Marsh, 223 F.3d at 1220 (Citing Steed v. Head, 219 F.3d 1298,1300, 1300 (11th Cir. 2000)); Weibley v. Kaiser, 50 Fed. Appx. 399, 403 (10th Cir. 2002).*

Furthermore, an additional ten-month period would not result in a timely filing. As the Magistrate Judge noted, the limitations period expired well over one year before Petitioner was given the option to drop claims or exhaust in his habeas action and before he returned to state court to pursue the unexhausted claims. *See Doc. 27 at 13-14.*

Second, the "actual innocence" exception requires a showing of new evidence, not present in the trial, that makes it "more likely that not that no reasonable juror' would have convicted him. *Schlup v. Delo, 513 U.S. 298, 327 (1995); See also Miller v. Mar, 11 F.3d 976, 978 (10th Cir.), cert. Denied,* 525 U.S. 891, (1998) Petitioner maintains he discovered "new" evidence of his "actual innocence" in October 2002 during Bankruptcy proceeding and that he advised the court

of his fist habeas action of the "new" evidence. Se Doc at 2; also *Salazar v. Williams CIV 10-1206 WJ/LFG* (Docs. 29-32). In his "writ of mandamus" submitted to the Tenth, Salazar additional asserts that the "newly" discovered evidence involves alleged conduct by his ex-wife in their financial affairs.

By his own allegations, Petitioner's concerns about Bankruptcy Trustee who testified and his sentencing and his ex-wife were known to Petitioner during the course of the state criminal proceedings, and indeed, before those proceedings were initiated. In fact, Salazar attempted to raise these issues with eh state court. *See Salazar v. Williams, CIV 01-1206 WJ/LFG (Record* Proper, Transcript of Sentencing *7/21/99; Doc. 22,* Exh. I (Deposition of James McCormick 3/12/98; *id.,* Exh. D (Petitioner's assertion that he "did address to the New Mexico Appeals Court that his Attorney Joseph Riggs was ineffective in almost 50 (fifty) ways," and directing attention to attached Exhibit A, which includes allegations of his innocence); *Doc. 18*
Exh. A (and attached Exhibit N, which is Petitioner's October 21, 1999 letter to Court of Appeals stating his attorney was deficient in almost fifty ways. I wish to submit a full statement of facts on each of the…issues.)" Thus, the basis for his claim of actual innocence was well-known to Petitioner long before the statute of limitations ran.

Furthermore, Petitioner entered a guilty plea in state court. His "conclusory claim of actual innocence, especially in light of his plea of guilty in open, is insufficient to entitle him to equitable tolling." *Loving*

v. Mahaffery, 27 Fed Appx. 925, 926 (10th Cir. 2001) (quoting Lasiter v. Thomas, 89 F. 3d 699, 702 (10th Cir. 1996)): "Solemn declarations in open court carry a strong presumption of verity of conclusory allegations unsupported by specific is subject to summary dismissal")

Finally, Petitioner asserts that the first habeas action should not have been dismissed and instead should have been stayed while he exhausted in state court. That position should have been raised in that first action, however. Evens to the best of my knowledge neither the supreme Court nor the Tenth circuit have mandated that mixed petitions be stayed to avoid the *Duncan*-effect. [1] Moreover, Duncan v. Walker, 533 U.S. 167 (2001) was decided months before Petitioner filed his first habeas action and that presiding judge specifically warned him that the one year statute of limitation would still apply to all of his claims if he opted to return to state court and exhaust. Thus, no basis for finding that Petitioner detrimentally relied on prior law in commencing his first habeas action, much less the second action before me.[2]

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[1] *See Pliler v. Ford,*___U.S.___,___, 124 S.Ct. 2441, 2445-5 (2004) ("the Ninth Circuit held that if a pro se prisoner files a mixed petition, the district court must give specific (continued.. warnings regarding the stay-and-abeyance procedure: first that it would not have the power to consider [a prisoner's] motions to stay the [mixed] petitions unless he opted to amend them and dismiss the then-unexhausted claims…and, second, if applicable, (continued..

Wherefore,
IT IS HERBY ORDERED AS FOLLOWS:

1. The Magistrate Judge's proposed findings and Recommended Disposition (Doc 27) is ADPOTED;
2. Petitioner's objections (Doc, 28-29) are DENIED AS WITHOUT MERIT;

3. Petitioner's motion regarding a stay (Doc. 30) is DENIED;
4. In light of the Court's Sua Sponte finding that the 2254 petition is time barred, Respondents' motion to dismiss (Doc. 16) is GRANTED INSOFAR AS the requested result is the same; and
5. A final order entered concurrently herewith.

S/_____
Judge Julia C. Herrera

1 continued
that [a prisoner's] federal claims would be time-barred, absent cause of equitable tolling, upon his return to federal court if he opted to dismiss the petitions without prejudice and return to state court to exhaust all of his claims... Without addressing the propriety of his stay-and-abeyance procedure, we hold that federal district judges are not required to give pro se litigants these two warnings. District judges have no obligation to act as counsel or paralegal to pro se litigants." (internal quotations and citations omitted); *Moore v. Schoeman, 288 F. 3d 1232, 1235 & n. 4 (10th Cir. 2002)* (" a district court faced with a habeas petition containing unexhausted claims may either (1) dismiss the entire petition without prejudice in order to permit exhaustion of state remedies, or (2) deny the entire petition without prejudice in

1 continued

order to permit exhaustion of state remedies, or (deny the entire petition on the merits. [FN4]...FN4. A third option suggested by justice Stevens 'opinion in Duncan, of retaining jurisdiction over the petition and staying further proceedings pending the exhaustion of state remedies, was apparently not examined by the district court and is not at issue here.")

2 *Compare York v. Galetka, 314 F.3d 522, 526 (10th Cir. 2003)*(tolling warranted where *Duncan*, decided, June 18, 2001, was "decided after the dismissal York's second federal habeas petition "on August 29, 1996); H*all v. Scott, 292 F.3d 1264, 1267-68 (10th Cir. 2002*) (" in the present case we do not reach the question of whether equitable tolling is always appropriate where a petitioner has timely filed his first habeas petition, because equitable tolling would appear to be warranted on other grounds... the Supreme Court's con's contrary holding in Duncan was not issued until June 18, 2001, nearly five months after Hall's habeas petition was refilled." Brown v. Proppel, 44 Fed Appx. 345 (10th Cir. 2002) ("on remand, the district court should consider whether the refilling of Browns habeas petition prior to the Supreme Court's decision in Duncan...Fed Appx. 345 (10th Cir. 2002) ("on remand, the district court should consider whether the refilling of Browns habeas petition prior to the Supreme Court's decision in Duncan...merits the application of equitable tolling to his case." (emphasis added; Griffin v. Lemaster, 37 Fed. Appx 348 (10th Cir 2002) (remaining for equitable tolling determination, not yet briefed or decided in CIV 00-949).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FO FILE STAMP
On copy give to petitioner

JOHN LESTER SALAZAR
Petitioner,

v. CUV 03-1010 JH/KBM

TIM LeMASTER, Warden, et al., Warden,
Respondent.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

The matter before me is John Lester Salazar's "Second Petition" seeking habeas relief under 28 U.S.C. 2254. the Tenth Circuit determined that the pleading does not constitute a "successive petition" and remanded the matter to this Court for further proceeding.

Because Salazar filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (" AEDPA"), a one-year statute of imitations applies. *E.g. Michael Williams v. Taylor, 529 U.S. 420, 429 (2000); Lindh v. Murphy, 521 U.S. 320, 3260327 (1997).* The limitations issue can be resolved on the record and, therefore, and evidentiary hearing is unnecessary. *E.g. Trice v. Ward, 196 F.3d 1151, 1159 (10th Cir. 1999), cert. Denied, 531 U.S. 835 (2000); Rule 8 (a),* Rules Governing Habeas Corpus Under Section 2254. I recommended that the petition be dismissed as untimely under 2244.

(e.g. Appendix C.)

I. Incorporation of Record Proper In *Salazar v. Williams*, CIV 01-1206 WJ/LFG

The first federal habeas action Salazar pursued was dismissed without prejudice because his petition was "mixed" but some of the claims were unexhausted. *See Salazar v. Williams,* CIV 01-1206 WJ/LFG *(Docs. 32,39,40).* There, Respondents filed the "record proper," which included the state court record as well as transcripts of the probation violation, plea and sentencing hearings. *See id.*

In this case before me, I was only able to ascertain a complete picture of the state court proceedings by consulting the record proper form the first federal preceding ands the record proper hare. Although the instant action does contain a number of exhibits from the first action, in order to be complete, I take judicial notice [1] of the contents of the prior suit. I cite to materials from the fist action using the designation *"Salazar I,"* and I cite to materials in the matter before me by document and exhibit number.

II. Procedural Background

A. Rule 5-801 Motion to Reconsider Sentence Following Sentencing

After accepting Salazar's guilty pleas, which was memorialized in written plea agreement that contained a waiver of direct appeal, the state court announced

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1 *See , e.g., Anderson v. Cramle,* 789. F.2d 840, 845 (10th. cont...

Salazar's sentence at a hearing held on July 21, 1999[2], and entered a final judgment and sentence on August 3, 1999. The judge sentenced him to a total of sixteen years imprisonment; with four years suspended during which Salazar would be placed on probation *See*

Salazar I (Record Proper at 154, 167-70); id. (July 21, 1999 Transcript of Sentencing Proceedings at 90) (hereinafter "Sentencing Transcript").

Between the hearing an entry of judgment, however, Salazar's attorney filed a "Motion to Reconsider Sentence" on August 2, 1999, citing NM Stat. Ann 39-1-1 as the basis for jurisdiction. Salazar I (Record Proper at 166a). In general, that statute gives a state court jurisdiction for thirty days in chich to rule on motions filed within that period and, if the court does not rule on the motion within thirty days of filing, the motion is deemed denied. [3]

Salazar's attorney asked the judge to hold a hearing and reconsider the sentence previously imposed because counsel had addition information to present. Id (Record Proper at 166a). In a letter stating that she "reviewed the file and pre-sentence report," the judge declined to hold a hearing and denied the motion. See id (record Proper at 171-72). The judge's letter and

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1 continued

Cir. 1986) (Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it,'" quoting St. Louis Baptist Temple, Inc. V. FDIC< 605 F.2d 1169, 1172 (10th Cir. 1979)); United States v. Estep, 760 F.2d 1060 (10th cir. 1985)("We recognized in Mansell v. Carroll, 379 F.2d 682 (10th Cir.), that judge looks to other court records in order to 'pierce the formalities of all of the transactions in question.' Although a court is not bound to notice other legal proceedings '[I] it is often done for a part of the record in the same proceeding or in prior stage of the same controversy.' LX Wigmore on Evidence 2579 (Chadbourn rev.1981)(emphasis in original."); Slack v. McCotter, 79 Fed. Appex 383, 391 (10th Cir. 2003)("Acting under out power to take judicial notice of related proceedings, see St. Louis Baptist Temple, 605 F.2d at 1172, we have obtained and reviewed a copy of the state district court docket sheet in the mandamus proceeding."). Continued..

order were filed on August 6, 1999, and she entered an amended final judgment and on August 11, 1999. the amended document was identical in all respects to the regional judgment; expect that the amendment specifically provided that petitioner was to be imprisoned during the first twenty years of the sentence. See id (record proper at 171-76).

Counsel appealed the denial of the motion to reconsider, asserting that the judge erred in failing to hold a hearing. See Doc. 18, Exh. A. Subparts J-K. the single-judge's summary disposition characterized the "motion to reconsider sentence" as a "motion for modification of sentence" under Rule 5-801(B), and further considered constitutional implications regarding the lack of a hearing. See id Subpart L.

Continued to 2

2. Under New Mexico law, an "oral pronouncement is not a final judgment and is subject to change until reduced to writing." *State v. Rushing*, 103 N.M. 333,334, 706 P. 2d 875, 876 (N.M. App.)(citing *State v. Daiz,* 100 524, 673 P.2d 501), (1983), cert. Denied. 469 U.S. U.S. 1016 (1984)), 103 N.M. 344, 707 P.2 552 (1985).

3. Final judgments and decrees, entered by district courts in all case... shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any such motion which may have been filed within such period, directed against such judgment; provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof; and, provided further, that the provisions of this section shall not be construed to amend, change alter or repeal the provisions of sections 4227 or 4230, Code 1915 [which the compiler's notes indicate are statutes superceded by New Mexico civil rule 60]. N.M. Stat. Ann 39-1-1 (Michie 1978).

Counsel filed an opposition to the summary disposition, and specifically raised a federal procedural and substantive due process issue. See id., supart M at 6.

While waiting decision by an appellate panel, Petitioner moved pro se to amend the appeal to raise climes that: (1) concurrent instead of consecutive terms were called for under the plea agreement; (1) his guilty plea was coerced [because] jailers beat [him] while demanding that [he] plead guilty," and (3) his guilty pleas was the result of ineffective assistance of counsel [who] was deficient in almost fifty [unspecified ways." Id., subpart N. The New Mexico Court of Appeals expressly stated that it declined to address the pro se issues because Salazar was represented; by counsel. Nevertheless, it appears they did:

> We point that even if counsel had raised these issues in a motion to amend the docketing statement we would have denied the motion. Issue 1 lack merit because there was no agreement as to sentencing. See *State v. Moore* , 109 N.M. 119, 128-29, 782 P. 3d 91, 100-01 (Ct. App. 1989) (viability requirement). Issues 2 and 3 likewise are not viable because they are not matters of record and would need to be addressed in a habeas proceeding. See *State v. Martin, 101 N.M. 595, 603, 686 P. 2d 937, 945 (1984) (court may not consider matters not of record)*

Id. Subpart O.4

As to the merits of counsel's argument, the panel of the Court of Appeals relied on State v. Sommer, 118

N.M. 58, 59 878 P. 2d 1007, 1008 (Ct. App.), *Denied.* 117 N.M. 802, 877 F.2d 1105 (1994), in characterizing the motion to reconsider as r Rule 5-801 (B) " post-conviction proceeding." It then held that under *Sommer,* post-conviction proceedings are "not considered a 'critical stage' or trial that would constitutionally require heightened procedural safeguards, such as the presence of a defendant. *Id*

The panel decision was issued on January 21, 2000, and the mandate issued on March 2, 2000. During that time, neither counsel nor Petitioner sought certiorari which the New Mexico Supreme Court. See Salazar I (Record Proper at 240-43). Petitioner's pursuit of relief in the state courts then ceased for the time being.

B. Rule 5-802 Petition For State Habeas Relief

Much later that year, on December 6, 2000, another attorney appeared on behalf of Salazar and filed a state petition seeking habeas relief under rule 5-802. See Doc. 18, Exh. A, Subpart P. habeas counsel raised similar arguments to those Petitioner unsuccessfully pursued pro se in the prior proceedings. Counsel argued that the plea was coerced by trial counsel's promise of probation, that the guilty was involuntary due to medication Petitioner was taking, and that counsel was ineffective during the sentencing proceedings. *See id.* Habeas counsel also requested and evidentiary haring. See id. Subpart Q.

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4. District Judge Christina Armijo was part of the state panel at the time. Consequently, she transferred the instant action to District Judge Bruce Black. See Doc. 3.

C. Initiation Of First Federal Habeas Petition

Proceeding Pro se, Petitioner pursued his first federal petition for habeas relief. Although it is unclear when the petition was mailed, it was filed on October 19, 2001. The court found the petition mixed, and gave petitioner the option of proceeding after the unexhausted claims or retuning to state court to exhaust. Magistrate Judge Deaton's opinion, dated February 11, 2003, specifically advised Petitioner that if her opted to return to state court, he should "bear[] in mind that the one-year statute of limitation still applied to all of the claims in this petition, including those that have been exhausted." *Salazar I* (Doc. 32 at 4).

Despite requests for clarification, Petitioner's subsequently pleadings did not unambiguously state which option he was choosing. Finding that he did not unequivocally withdraw the unexhausted claims, District Judge Williams Johnson therefore entered a judgment dismissing the mixed petition without prejudice on March 7, 2003. See id. (Docs. 39,40). Petitioner immediately filed a motion for reconsideration and notice of appeal, where he took the position that he wanted to withdraw the unexhausted claims. On April 28, 2003, Judge Johnson notified the tenth Circuit that he would grant the

4 Continued

After requiring a response from the State, the judge who presided over the habeas matter denied the petition "summarily" without an evidentiary Hearing. However, he did explain his reasons for the denial in some detail. *See id.*, Subparts R. U. Counsel petitioned the New Mexico Supreme Court for certiorari, which was denied on September 7, 2001. *See id.*, Subpart W.

motion and proceed to consider the exhausted claims, and therefore requested that it remand the case to district. See id Docs. 46. 50).

Unbeknownst to Judge Johnson, however, Petitioner had changed his mind yet again and in fact returned to state court to pursue the unexhausted claims. See id (Docs. 49.50) among other things,[5] Salazar had filed a state petition for habeas corpus relief raising the unexhausted claims as of March 27, 2003. See Doc 18, Exh. KK. On July 18, 2003, the very day the state judge summarily denied that petition after making detailed findings, Petitioner notified this court that he did not want to withdraw the unexhausted claims after all. Se id., Exh. LL. According to the records submitted by Petitioner, he then filed a petition for certiorari with the New Mexico Supreme Court on August 7. 2003, which was denied on August 14, 2003. See Doc. 21, Exh. C. According to the records submitted by respondents, he also filed a motion for "reconsideration" with the district court on September 3, 2003, which was summarily denied without explanation on September 17, 2003. See Doc. 18, Exhs. MM-NN.

D. Second Federal Petition Filed Before The First Federal Habeas Action Concluded

Petitioner filed the "Second Petition" seeking federal habeas corpus relief with this Court on August 29, 2003. Doc. I. At that time, his first federal habeas action had not been fully resolved and still pending.

In the first federal habeas proceeding, Judge Johnson had informed the Tenth Circuit that Salazar had changed his mind and wanted to pursue state habeas relief of the unexhausted claims. Judge

Johnson therefore told the Court of Appeals that he was withdrawing his previous request to remand the action. Salazar I (Doc. 50). Consequently, the Tenth Circuit [preceded with the appeal of the dismissal of the first federal petition and disposed of the matter by denying a certificate of appealability in an order dated January 20, 2004. Id. (Doc. 52).

III. Analysis

As discussed above, this case presents a multitude of procedural questions potentially affecting the timeliness of the second Petition now before me. Having thoroughly analyzed those issues, however, I have chosen to raise the statue of limitations issue *sua Sponte*[6] because this second petition is plainly untimely.

A. AEDPA Statute Of Limitations

Whether a petition is timely under the applicable one-year limitations period requires a determination of two things: (1) when did the limitations period commence to run and (2) how many days was it tolled after it began running?

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5. While his first federal habeas petition was pending, he also unsuccessfully pursued other avenues of relief in state court from August 8, 2002 through May 7, 2003. See Doc 18, Exhs. EE-JJ OO-QQ.

6 *See Kirk v. Mullin,* 42 Fed. Appx 336, 337 (10th. @002) (" the magistrate judge reviewed the [2254] petition and *sua sponte* raised the issue of timeliness of the filing of the petition. It is clear tah the magistrate judge had the power to raise the timeliness question sua sponte. Hardiman v. Reynolds, 971 F.2d 500, 502-04 (10th. Cir. 1002).").

Pursuant to 28 U.S.C. 2244(d)(1), the AEDPA one-year limitations period commences "from the latest" of four possible time periods, only one of which is implicated here-the date the state conviction became "final." As "the conclusion of direct review or the expiation of the time for seeking" direct review is also judicially defined as including the ninety-day period in which a defendant can petition the supreme Court of the United States for certiorari, provided a direct appeal is taken.[7] After a conviction becomes " final"

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7. *E.g., United States v. Martin* 357 F.3d 1198 1200 (10th 2004) (2255 petitions: "if a prisoner does not file a petition for writ of certiorari with the United States supreme Court after his direct appeal, the one-year limitation period begins to run when the time for filing a certiorari petition expires. A petition for writ of certiorari must be filed within ninety days after denial of a timely petition for rehearing. United States v. Hurst, 322 F.3d 1256,1259 (10th Cir. 2003)."); *Gamez v. Edmondson, 61 Fed. Appx. 666, 667* (10th Cir. 2003)(2254 petitions: "Gamez's conviction became final on July 1, 1998, ninety days after OCCA affirmed his conviction of direct appeal. See Locke v. Saffle, 237 F. 3d 1269, 1273 (10th Cir. 2001)(holding that a conviction became final for habeas purposes when the ninety-day period for filing a petition for a writ of certiorari to the United States Supreme Court has expired)."); See also York v. Galetka, 314 F.3d 522, 526 (10th Cir. 2003)("we must consider whether York's motion to withdraw his guilty plea was part of the direct appeal process, or part of the state collateral review process. I York's motion was part of the direct appeal process; it bought him an additional ninety days of statutory tolling to seek certiorari in the United States Supreme Court. *Loke* [, 237-72]. If this additional ninety-day statutory tolling period were applied, it would render York's third federal habeas petition timely. If York's motion was a collateral proceeding, however, the motion did not provide him with an additional tolling period for Supreme Court certiorari. Id. At 1271 n 2."; Pfeil v. Everett, 9 Fed. Appx. 973, 977 (10th Cir.

the limitations period is statutorily tolled for the periods "during which a properly filed application for state post-conviction or other collateral review… is pending." 28 U.S.C.2244 (d)(2)

B. Regardless of Whether The Motion To Reconsider Is Considered Part of Direct Review Or Collateral Review, Salazar Had Less than a Month Remaining On His One-Year Statute Of Limitations When The First Habeas Petition Was Filed

The inquiry here is complicated because Petitioner did not take a direct appeal from the either the original or amended judgment and sentence. Instead, he filed a motion for reconsideration of between the entry of those two orders. Ordinarily, I "must first consider whether [the motion for reconsideration] was part of the direct appeal process, or part of the state collateral review process." York v. Gallletka, 314 F.3d 522, 526 (10th Cir. 2003). I have found virtually no binding authority on point.[8] Although I am inclined to believe that the motion to reconsider should be characterized

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7 Continued
2001) ("Mr. Peel's direct appeal and his judgment and sentence became final August 27, 1997 [30 days after entry of judgment and sentence on a guilty plea]. Because Mr. Pfeil did not file a direct appeal to the Wyoming supreme Court, the ninety-day time period of appeals to the United States Supreme Court did not extend the date that his judgment and sentence became final.")

8. The Supreme Court has indicated in dicta that the definition of "finality' in 2244(d)(1)(A) evidences a Congressional intent to have the "finality…determined by reference to a uniform federal rule." See Clay v. United States, 537 U.S. 522, 530-31 (2003) ("Section 2244(d)(1) governs petitions by state prisoners. In that

as part of the post-conviction process.[9] Yet, in the context of the particular facts of this case, I need not

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8 Continued
context, a bare reference to 'become final' might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State... The words 'by the conclusion of direct review of the expiration of the time for seeking such review' make it clear that finality for the purpose of 2244(d)(1)(A) is to be determined by reference to a uniform federal rule.").

I believe, however that a decision on where to pigeonhole Salazar's motion to reconsider sentence necessarily begins with reference to state law and to how the state courts characterized the motion In *York*, for example the Tenth Circuit held that a motion to set aside a guilty plea was par of state collateral review in Oklahoma, reasoning that:

> Typically, a motion to withdraw a guilty plea is considered part of the direct appeal process. See e.g., Hickman v. Spear, 160 F.3d 1269, 1271 (10th Cir. 1998) (***noting Oklahoma State Courts' characterization of motion to withdraw guilty plea as part of direct review process*** for procedural default purposes). Here, however, York did not bring his motion until nearly twelve years after he was convicted. By the time he brought the motion, he had already filed two state habeas proceedings and one federal habeas. Moreover, the state court itself characterized his motion as a post-conviction proceeding. See...('Although the matter here under consideration is a motion to withdraw a guilty plea, it is considered as o post-judgment writ.')

York, 314 F. 3d at 526-27 (emphasis added). But Compare Lambert v. Warden, 81 Fed. Appx.1 (6th Cir. 2003)(recounting history of decisions that hold that Ohio procedure for reopening an permitting delayed appeal to raise issue of ineffectiveness of appellate counsel is part of direct review, notwithstanding Ohio state court interpretation hat such proceedings are post-conviction proceedings.)

9 I would find that for AEDPA limitations purpose, Salazar's

decide the characterization issue at this juncture. Regardless of how the motion to reconsiders characterized. I reach the same result for AEDPA limitations purposes.

I. Calculation if characterized as Post-Conviction Review

If, for instance, the motion to reconsider is part of post-conviction review, Salazar's conviction became "final" for 2244(d)(1) purposes thirty days after entry of the judgment on Tuesday, August 3, 1999 or, in other words, Thursday, September 2, 1999. Since September 2000 fell on a Saturday and the following Monday was Labor Day, his first federal petition would have been due by Tuesday, September 5, 2000, absent tolling.[11] That deadline was simultaneously

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9 Continued
motion to 'reconsider' sentences characterized as a "post-conviction' proceeding even though it was filed immediately following sentencing, and that Salazar's motion thus comes into play in the AEDPA analysis at the 2254(d)(1)(B) tolling inquiry stage. Paralleling the analysis in the Tenth Circuit's decision in York, New Mexico Rule 5-801 motions are generally defined by he state court as being post-conviction proceedings, and the state decisions in Salazar's particular case characterized his motion as a Rule 5-801 proceeding. See N.M. rule 5-801(B) (which falls under the heading "special proceeding" and was modeled after former version of Fed. R. Crim. P. 35 in effect prior to 1997, which falls under the heading "post-conviction procedures;" both rules contain two different time frames in which the motion can be filed-wither after sentencing, or after conclusion of an appeal upon direct review). Even though a Rule 5-801 motion can be filed after sentencing instead of waiting until the conclusion of direct review, New Mexico follows the principle that the substance of the motion and not hr asserted basis for jurisdiction determines how a motion is characterized. As a result, both the State courts and the Tenth circuit have characterized a rule 5-801

motion as a "post-conviction" or "collateral" proceeding. This is tolled under 2244(d)(2), however, because the properly filed post-convtion proceeding was pending on the date that AEDPA statute began to run. Thus, the limitations period proceeding was

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9 Continued

so under state law, regardless of whether the movant had specifically attempted to invoke jurisdiction for the motion under 39-1-1. See *Truelove v. Smith*, 9 Fed. Appx. 789, (10th Cir. 2001)(Rule 5-801 motion filed after conclusion of direct appeal characterized as "post-conviction/collateral" and applied to 2244(d)(2) analysis); *State v. Lucero*, 130 N.M. 676, 677, 30 P. 3d 365, 366 U.M. 2001)("Rule 5-801...like Rule 5-614, provides a method for post conviction relief, specifically the modification of a sentence."); *State v. Neely*, 117 N.M. 707, 708-09, 876 F.2d 222 223-24 (N.M. 1994)(motion to reduce sentence asserted 39-1-1 as basis for jurisdiction; noting that state correctly cited decisions that construe 39-1-1 to only apply to bench trials, New Mexico Su [preme Court declined to address whether those decisions are correct because it construed the motion 'as being one under...Rule 5-801(b)... to reconsider and reduce her sentence regardless of her motion's assertion of the basis for jurisdiction"); Sommer, 118 N.M. at 59, 878 F.2d at 1008 (rule governing defendant right to be present at certain stages "says noting about post-conviction hearings, such as the one in this case [under rule 5-801 (B)]; *State v. Peppers*, 110 N.M. 393, 796 P. 2d 614 (N.M. App.) (39-1-1 "has been superseded in part by Rules 5-614 and –801, which provide the specific provisions governing motions for new trial and motions for reconsideration of sentence"), cert. Denied, 110 NM 260, 794 F.2d 734 (1990). Also, the rule that extends time to appeal does not include 5-801 motions. Under Rule 12-201(D), a "post-trial" motion brought under 39-1-1 extends the time in which to take a direct appeal, as do other specified motions. A motion to "modify sentence" under rule 5-801, on the other hand, is not listed among them See N.M. Rule 12-210(D))(specifying that motions under civil rules for judgment as matter of law/alternative new jury trials, for request to court to enter findings and conclusions in non jury trials, or for new trial in jury or on jury trials and under criminal rule for new

was tolled fro 161 days, from the date the conviction became final on September 2, 1999 to February 10, 2000, twenty days after the Court of Appeals issued its decision.[12] The Statute of limitations then ran unabated from February 11, 2000 to December 6, 200, the date when Salazar's counsel filed a state habeas petition. Those proceedings were pending for 275 days, from December 6, 2000 until September 7, 2001, when

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9 Continued
trial based on grounds other that newly discovered evidence, " the full time prescribed itntehi rule for the filling of the notice of appeal shall commence to run and be computed form either the entry of an order expressly disposing of the motion or the date of any automatic denial to the motion under that statute or any of these rules, whichever occurs first.")
Further more, Salazar's plea waived a direct appeal of the conviction or sentence as it was imposed, further suggesting that counsel's motion was intended as a post-conviction proceeding. See Doc. 18 Exh. A. Subpart G. at P5 ("Unless the plea is rejected or withdrawn, the Defendant hereby fives up any and all motions, defenses or objections which he has made or raised or could assert hereafter to the court's entry of judgment and imposition of a sentence upon him consistent with this agreement. The Defendant also waives the right to appeal the conviction that results from the acceptance of the Agreement.")

10 See N.M. Rule 12-201 (A)(2)(notice of appeal in any case other than decisions suppressing or excluding evidence or requiring return of seized property must be filed within thirty days of the judgment or order appealed from); Pfeil, 9 Fed. Appx. At 975 (conviction from entry of judgment and sentence on guilty plea was thirty days after judgment entered where no direct appeal filed).

11 The " anniversary date," which is as the same date of the following year, is used as opposed to the "calendar date, " defined as one day before the same date of the following year. Thus, if a conviction becomes final on August 1, 1999, a petition that is filed on August 1, 2000 or before is timely under the one-year limitations period. See, e.g., *United States v. Hurst*, 322, F.3d

the New Mexico Supreme Court denied certiorari. Thus, the first federal petition would have been due September 5, 2000 absent tolling. Adding the two instances in which the limitations period was tolled, or 436 days, the first federal petition thus was due by Thursday, November 15, 2001. Through it is not clear when Salazar mailed his first federal petition, or the circumstances under which he did so for the federal

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11 continued
1256, 1260 (10th Cir. 2003); Malone v. Oklahoma,_Fed. Appx_, 2004 WL 1249859 (10th Cir. 6/8/04)(Hurst holds "that one-year limitation period in AEDPA should be calculated using anniversary date method even when intervening period includes leap year").

12 Under Gibson v. Klinger, 232 F.3d 799, 804 (10th Cir. 2000), "regardless of whether a petitioner actually appeals a denial of a post-conviction application, the limitation period is tolled during the period in which the petitioner could have sought an appeal under state law." Under New Mexico law, Salazar had twenty days to petition the New Mexico Supreme Court for certiorari, See N.M. Stat. Ann. 34-5-14(B)

Under Gibson, the date that the Court of Appeals filed its decision plus the time in which to petition, as opposed to when the Court of Appeals filed its mandate is the applicable date from which to calculate. Other courts have been faced with the issue of whether the later-issued mandate controls have rejected the argument. See White v. Klitzkie, 281 F.3d 920, 932-24 & n.4 (9th Cir. 2002)(rejecting contention that entry of mandate signaled conclusion of review absent a specific state rule that defines another time frame for considering a decision final); See also Hutchinson v. Farwell, 86 Fed Appx. 292 (9th Cir. 2004)(rejecting contention that state court decision one post-conviction review became final when district court received Nevada supreme Court's order of remitted); Lewis v. Maine, 254 F. Supp. 2d 159, 162-63 (D-Me. 2003)(noting that in situations where tolling applies to a period of further review, date of entry of decision on docket controls); N.M. Rule 12-402(C) ("Mandate from the Court

A prison mailbox rule" purpose, the first federal petition was filed on October 19, 2001. Using the filing date as my benchmark Salazar thus had 27 days left on his one-year limitations period when he filed his first federal habeas petition.

2. Calculation if characterized as part of Direct Appeal

alternatively, if the motion to reconsider sentence was considered as part of the direct appeal, Salazar had 28 days left on his one-year limitations period when he filed his first federal habeas petition. That is, because the rule 5-801 motion was not pursued beyond the Court of appeal level, his conviction would have become "final" under 2244(d)(1) on Thursday, February 10, 2000.[13] His federal petition would have been due Monday, February 12, 2001, since February 10, 2001 fell on a Saturday. Adding the 275 days during which his state habeas petition was pending, Salazar's first federal petition would have been due Wednesday, November 14, 2001. therefore, the sttute of limitations did not bar the first federal petition.

C. the "Duncan Problem" And Equitable Tolling

In *Duncan v. Walker*, 533 U.S. 167 (2001), the Supreme Court held that a federal habeas petition

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12 Continued
of appeals shall not issue until the time has elapsed for seeking certiorari in the supreme court.").

13 *See Pfeil*, 9 Fed. Appx at 977 (" Because Mr. Pfeil did not file a direct appeal to the Wyoming Supreme Court, the ninety-day time period for appeals to the United States Supreme Court did not extend the date that his judgment and sentence became final. See United States Supreme Court rule 13 (stating ninety-day period applies only to decisions from the state court of last resort).")

does not qualify as "other collateral review' for statutory tolling under 2233(d)(2). By the time Salazar filed his first federal petition, the Supreme Court's decision in Duncan was approximately four months old. See York, 314 F.3d at 527 (noting that Duncan was decided on June 18, 2001). Accordingly, the statute of limitations continued to run after Salazar filed his first federal petition. Even by the time Magistrate judge Deaton filed the February 11, 2003 opinion filing Salazar the option of exhausting or dropping the unexhausted claims set fourth in the first federal petition, the AEDPA statute had been expiree for over a year.

Thus, the second Petition is barred as untimely filed. The only avenue available to excuse noncompliance with the AEDPA statute of limitations lies if Petition establishes grounds for equitable tolling or actual innocence. E.g. Miller v. Marr, 141 F.3d 976, 978) 10th Cir.), cert. Denied, 525 U.S. 891 (1998). Petitioner has not yet had the opportunity to raise any additional grounds for equitable tolling. To assure that Petitioner has meaningful opportunity to do so, I will give him more than the usual time within which to file his objections.

Wherefore,

IT IS HEREBY RECOMMENDED that this second 2254 petition be dismissed as time barred.

IT IS FURTHER ORDERED that Petitioner will be allowed **thirty (30) days** of the receipt of these Proposed Findings and Recommended Disposition in which to file his objections pursuant to 28 U.S.C. 636(b)(1) and set forth his grounds for equitable

tolling, if any. **The written objections must be filed with the Clerk of the District Court. If no objections are filed, no appellate review will be allowed.**

S/_____
Karen B. Molzen
United States Magistrate Judge

COUNTY OF BERNALILLO
STATE OF NEW MEXICO

ENDORSED FILED IN
MY OFFICE THIS JUL 18, 2003
S/ CLERK DISTRICT COURT

JOHN LESTER SALAZAR,
Petitioner,

Vs.

CR 98-0659
CR 94-0098

PATRICK SNEDEKER, WARDEN,
Respondent.

ORDER

This matter came before the Court on the Petitioner's March 27, 2003 Petition for Writ of Habeas Corpus and other pleadings pursuant to rule 5-802 of the Rules of Criminal Procedure for the District courts. The pleadings and exhibits submitted by the Petitioner were of considerable quantity and required a substantial amount of time for review and analysis by this Court. The court now having extensively review the record and being otherwise fully advised in the premises Finds and Orders the following:

1. The Petitioner, once again, requests that the Plea and deposition Agreement that he entered in case CR (98-0659 be set aside based on seven claims stated in his Petition.

CLAIM I. [Voluntariness of Plea Agreement (promises alleged)]

2. The Petitioner claims that the plea agreement should be set aside based on his attorney's false assurances that he would receive probation in return for his guilty plea.

3. The Petitioner acknowledges that this Court by the Order filed in this matter on July 27, 2001 and the Court's have addressed this claim previously (e.g. Appendix D)

July 26, 2001 letter detailing the findings and decision of the court incorporated by reference into the July 27, 2001 Order. (Exhibit One).

4. This Court reaffirms its decision detailed in the July 26, 2001 letter and July 27, 2001 Order (Exhibit One.)

5. Relevant portions of the Plea proceeding record indicate that the petitioner was sworn and testified testifies at that proceeding on May 3, 1999 as follows:

Upon being advised of the minimum and Maximum sentencing exposure by Judge Dal Santa, the Petitioner was asked if he wished to continue with his plea. Mr. Salazar answered "Yes, Your Honor."

Upon being asked if anybody had forced or threatened him in any way to give his rights to a preliminary hearing or grand jury for determination of probable cause to charge him with the charge contained in the Information filed by the State, Mr. Salazar answered "No, your Honor".

Upon being asked if anybody had forced or threatened him in any way to get him to plead guilty and admit that he had a prior felony conviction, Mr. Salazar answered "No, Your Honor".

Upon being asked if anybody had promised him anything other than what was stated in open court at the hearing, Mr. Salazar answered "No, Your Honor."

Upon being asked if he was making his admission freely and voluntarily, Mr. Salazar answered "Yes, Your Honor."

Upon being advised that he was giving up the right to a speedy public trial, the right to appeal, the right to confront and cross-examine the state's witnesses, the right to subpoena witnesses of his own, the right to

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present evidence on his own behalf, the right to remain silent and the right to presumption of innocence, Mr. Salazar answered "Yes, Your Honor. I understand that I give those up."

Upon being asked if he understood that he was giving up all sorts of claims that he would otherwise have including his defenses and rights, Mr. Salazar answered "yes, Your Honor."

In discussing the Sinequan medication, which Mr. Salazar was taking, he was asked if the medication interfered which his ability to understand the plea proceedings. Mr. Salazar answered, "No, it actually helps me to understand them better." He was further asked if there was any reason that he could no understand the plea proceedings and he responded "No, Your Honor"

Upon being asked if he had discussed the matter thoroughly with his attorney, Mr. Salazar answered, "Yes, Your Honor". He was further asked if he was satisfied with his attorney's advice to him and Mr. Salazar answered, "Yes".

CLAIM II[Volutariness of Plea Agreement (Medication Claim)]

6. The Petitioner claims that his plea of guilty was not voluntary because he was under the influence of medication at the time he entered his plea.

7. The Petitioner acknowledges that this Court in the Order filed in this matter on July 27, 2001 and the court's July 26, 2001 letter detailing the findings has addressed this claim previously and decision of the Court incorporated by reference therein. (Exhibit One.).

8. The court refers to the Plea Proceeding record

summarized above and reaffirms its decision on this issue as detailed in the July 26, 2001 letter and July 27, 2001 Order. (Exhibit One).

9. The Petitioner raises additional grounds under this claim that Dr. Roll was not called by his attorney to show Dr. Seagraves statement incorrect. He further contends that his sentencing proceeded without Dr. Roll being present. Dr. Seagraves' report and Dr. Rolls' report were attached to the presentence report along with a report from Dr. Rodriquez. The sentencing record supports hat the presentence report was considered by the judge at sentencing and subsequently reviewed in response to the Defendant's Motion for Reconsideration. (Order Denying Motion to Reconsider Sentence filed August 6, 1999) this issue is further, addressed below.

10. The Petitioner raises the issue that his counsel was ineffective because he did not hire and accountant as an expert witness to review the financial records of Crestview Funeral Home. There is no evidence that an accountant was needed in this case to enable the defendant's attorney to understand the financial records. In this perspective, the record indicates than the Defendant, himself was an owner and president of the business. In addition, to the Defendant. Members of his family were close to and had substantial knowledge of the business. The Defendant stated to the presentence report writer that "some" of the discrepancies could be related to accounting mistakes. In summary, record reflects that the defendant and his family possessed substantial knowledge regarding the financial workings of the company. This knowledge clearly would have enabled he Defendant and his

Attorney to adequately make an informed decision on accepting the plea. I addition, the sentencing record indicates that Mr. Riggs had the case thoroughly investigated as discussed below:

CLAIM III. (Sentencing Testimony/Strategy/Argument).

11. The Petitioner claims that James McCormick testified falsely at the sentencing proceeding and that his attorney allowed this and prevented Petitioner form responding. This issue has been previously addressed in the Court's July 26, 2001 decision letter and July 2001 Order. This Court reaffirms it's ruling they're stated.

12. Further, the Petitioner specifically claims that Mr. McCormick falsely stated that the Petitioner..." went out between 5pm and 10pm or at some other time is not material. Prior to the sentencing, the Defendant entered a plea agreement admitting that he committed the crimes as stated.

13. The Defendant had the unrestricted opportunity to speak to the Judge at the sentencing hearing following McCormick's statement. The Defendants spoke at great length and did so without attacking McCormick's Statements. The defendant spoke at great length and did so without attacking McCormick's Statements. The record supports that the Defendant freely addressed the court without interruption from Mr. Riggs.

14. The Petitioner raised additional arguments stating that he could have countered the witness's statements at trial, thus creating a defense. He further contends that his attorney, allowed the witness statement to go unrebutted demonstrating a conflict of interest. As

stated above, and a previously addressed by this court, the statements made by the witness at sentencing regarding the time of the crimes were immaterial since the Defendant admitted the crimes at the plea proceeding. Undoubtedly, the Petitioner's attorney recognized this and chose not to pursue this inconsequential area Defendant's own statement in his pleadings indicate that it was a strategy that sentencing would proceed more favorably not challenging McCormick's statements at that hearing. At that hearing, the Defendant's own statements were in the nature of remorse and accepting responsibility for the criminal acts. In that light, it would have been inconsistent and immaterial for the Derendant to attack McCormick's statements on how the crimes were committed. The sentencing record addressed below discusses this issue further.

15. The extensive sentencing explanation given Judge Dal Santo indicates that McCormick's statement were no the basis for the sentence impose. Her explanation focused on the devastating impact the defendant's crimes had on the victim's Specifically, Judge Dal Santo expressed her concern regarding the Defendant's violation of the victim's trust and the extensive financial and mental hardship done to numerous elderly and disabled people and their families. The record indicates that the McCormick's Statement had little if Andy impact; on the sentence imposed.

16. Judge Dal Santo had the opportunity, in reviewing the Defendant's request for reconsideration of sentence, to entertain further evidence from Dr. Roll and others. After review of the record and the

presentence report, reasonable inferences from the record indicate that she determined that further input areas was not necessary and that the sentence impose was appropriate. Her decision to no conduct a hearing on the Defendant's motion for reconsideration was upheld by the New Mexico Court of appeals.

CLAIM IV. (Coercion allegation).

17. For the first time, the Petitioner claims that his plea was involuntary stating that it was forcibly coerced, by jail guards and ten months in segregation. In this regard the Petitioner alleges that he was beat by jail guards late in October 0f 1998. This incident is indicated in the medical records, was reported at the time to jail authorities and made known then to the Defendants' proper attorney, Ron Koch. With the incident being fully exposed, it is not reasonable to conclude that the incident had any coercive effect on the plea agreement in this case. The Plea and disposition agreement in this case was entered over six month later on May 3, 1999 and filed May 6. 1999. Petitioner also infers the claims that he was coerced by Dr. Seagraves. The Defendant's allegation, that Dr. Seagraves had abused him in September of 1998, was recited in Dr. Seagraves' report and reviewable by all including the Court well before the plea agreement was entered. In addition, the plea record indicates that, while under oath, the Defendant stated to the judge that he was voluntarily entering the agreement.

18. As stated above, prior or accepting the plea agreement, Judge Diane Dal Santo asked the Defendant "Did anybody force or threaten you in any way to get you to plead guilty and make that admission of being previously convicted?' In open

Court the Petitioner answered, "no, Your Honor." Further, the Court questioned, "Are you making you admission freely and voluntarily?" the Petitioner again answered, "Yes, Your Honor."

19. Petitioner's position that he was coerced six months prior to the plea is not plausible and directly conflicts with his statements to the Judge in open court indicating that his plea was voluntary and no the result of force of coercion.

CLAIM V. (Allegation of failure to Investigate Case Number (CR 94-0098).

20. The petitioner claims that the conviction which formed the basis for the habitual enhancement in this case should be set aside because of unspecified new evidence that he is innocent.

21. The defendant argues that there were exculpatory evidence and motions, which were not heard in that matter and that Mr. Riggs as his attorney in case CR 98-00659 should have investigated the validity of that conviction. On this issue, the record indicates that the Petitioner, represented by other counsel, entered an Alford plea in case CR 94-0098. As such, he maintained his innocence but entered a plea of guilty in order to accept a favorable offer from the State in that matter. In fact, the Defendant received a conditional discharge as a result of the Plea Agreement. The record clearly infers that the acceptance of the plea agreement in CR 94-0098.

22. The Petitioner's claim centers on copies of two undated letters from supposed fact witnesses, which he believes support his position. In addition, he contends that the three motions filed in that matter should have been litigated prior to his entry of the lea agreement in

CR 94-0098.

23 In accepting the plea agreement in CR 94-0098, the Court concluded that the defendant knowingly and voluntarily entered the plea agreement. By its nature, entry of an "Alford" plea indicates that the Defendant while professing innocence pled guilty to accept the favorable deal offered by the State. In doing so the Defendant waived his right trial including the right to present motion, testimony and other evidence, subpoena witness, confront the State's witnesses, and to have jury decide his case. The record supports the validity of that conviction.

24. Even had Defendant gone to trial the time for raising new evidence claims as a basis for new trial had long expired at the time of his plea agreement in DR 98-00659. The Defendant had raised no legitimate basis for invalidating the conviction in CR 94-0098.

25. The Petitioner received the benefit promised him and was placed on probation. The acceptance of the plea falls within the realm of strategy of the defense to save the Petitioner's record and minimize the Petitioner's exposure to criminal penalties.

26. Further, it appears from the record in this case that the probation violation in CR 94- 0098 was consolidated to the benefit of the Petitioner. In fact, the Plea and disposition, Agreement in this case provided that the remaining time in CR 94-0098 run concurrent with the charges in CR 98-659. The effect of the agreement was that the Defendant served no additional time in CR 94-0098.

27. In additional, although CR 94-0098 constituted a prior for enhancement purposes. The enhancement was for only one count exposing the Petitioner to one year

under the plea agreement instead of the potential one-year on each of the three counts or three –year exposure.

28. Finally, the Petitioner's pretrial confinement time more than covered the time imposed on the probation violation and the one-year enhancement time.

29. The Petitioner has not alleged any basis for setting side the Alford Plea entered by way of agreement in CR 94-0098.

30. There has been no legitimate basis stated which would require Mr. Riggs to investigate the validity of the CR 94-0098 before the entry of the plea agreement in CR 98-00659. Finally, the record of the plea proceeding in CR 98-00659 indicates that the Defendant admitted being the same person who was charged with and convicted of the felony in CR 94-0098. In doing so, he did not dispute the validity of that conviction.

CLAIM VI. (Claims of Misconduct).

31. The Petitioner claims that the prosecutors in cases CR 94 94-0098 and CR 98-659 engaged in misconduct.

32. From the allegations stated, these matters appear to have been within the discovery known to the Petitioner at the time he entered the plea agreement. By entering the plea agreements. He waived the right to pursue these claims.

33. The Petitioner refers to lost and destroyed evidence without specificity and vaguely refers to new evidence which would prove him innocent.

34. The Petitioner has not shown that these matters in any way affect the validity of the plea agreement entered. By entering the plea agreements, he waived

the right to pursue these claims.
35. In each case, the h petitioner knowingly entered a voluntary plea agreement waiving his right to trial in that case. Each plea resulted insubstantial benefit to the Defendant by significant reduction of charges. His exposure to incarceration was substantially reduced in each case. Pursuant to the record, when the Petitioner waived his right to trial, he also waived the rights which or with the trial including the right present defenses. The plea proceedings record stated above clearly demonstrates that the Petitioner knowingly and voluntarily waived the rights, which go with the trial.
CLAIM VII. (Ineffective Assistance of Counsel Claims).
36. In generalities, the Petitioner has claimed that new exculpatory evidence came to light as a result to the bankruptcy proceeding that occurred after his conviction. He vaguely argues that his attorney failed to investigate properly prior to entry of the plea agreement.
37. The petitioner does not specifically state the evidence, which he refers to. It however is apparent that the evidence he refers to has always been within his personal knowledge of the inner working of the business, Crestview Funeral Home.
38. As stated above, in accepting the plea agreement, the petitioner waived the defenses he might have had at trial. The petitioner has presented no meritorious evidence, which would render the plea invalid.
39. The Defendant raised a multitude of claims that his attorney was ineffective in his assistance to him. Many of their claims raised were repeated, in different words, numerous times by the defendant.

40. The Defendant as owner and president of the business and in the best position to know the detail of the financial workings of the business. Most of the matters which the defendant contends were not investigate by Mr. Riggs were already within the personal knowledge of the defendant. Further the Defendant does not provide any evidence which would indicate that Mr. Riggs did not sufficiently investigate.

41. The defendant's contentions that Mr. Riggs did not investigate a number of matters in the case are not supported by the record. Specifically, the record of the plea proceedings indicates that the Defendant was satisfied with his Attorney's work establish the plea to be knowingly and voluntarily entered.

42. Mr. Riggs' investigator testified at the sentencing proceeding summarizing in detail the investigation which she performed at eh request of Mr. Riggs. Her statements indicated that Mr. Riggs had requested that she take all or that claims that had been made against Crestview and go through them validate or invalidate, and come up with a restitution amount. She looked at approximately 450 claims and talked with the people involved or their representative in approximately half of the claims she considered the information received from Mr. McCormick and his attorney, the funeral home record books, trustees, records from Bankruptcy Court, banks, credit card companies, and others. She testified that some of the Funeral home records were not very good. She also testifies that it looked like the Defendant was not personally benefiting from what he was doing but instead he would put the money he received back into the business to keep up with cost

and keep the business open. This record indicates that Mr. Riggs acted effectively by causing the case to be thoroughly investigated.

43. The defendant alludes to some type of conflict which his counsel had which he believes compromised his representation. This allegation is ambiguous and not supported by any degree of specificity which would allow fro an intelligent assessment of this claim.

44. Many of Defendants claims against are directed at the sentencing proceeding in CR 98-0659. The sentencing proceeding record is analyzed below.

45. A review of the entire record of the sentencing proceeding indicates that it was extremely will litigated. The proceeding lasted approximately two hours and forty minutes and included many witness for each side. Clearly present, was a well-prepared defence strategy and presentation. After the State had concluded their sentencing presentation, Mr. Riggs presented the seven witnesses and the Defendant. These witnesses included friend of the Defendant who have known him and his family for years, and ex-court of appeals judge, a minister, the Defendant's brothers, and Mr. Riggs' investigator. The testimony presented indicated as well-organized effort to show the Defendant was person of good character, who routinely went out of his way to help others. Mr. Riggs carefully referred to Dr. Rolls' report and recommendations. The defense portrayed the defendant as remorseful of the harm done to others and that he was seriously taking responsibility for his offenses and extremely concerned that restitution be made. The record of the sentencing phase of the proceeding indicates that Mr. Riggs skillfully

proceeded with purpose; and structure in presenting evidence and arguments in mitigation. The record indicates an extensive and comprehensive argument by Mr. Riggs on behalf of the Defendant including an effort to persuade the court against further jail time. By the fore going, one can only conclude that the Defendant received effective assistance of counsel at eh Sentencing proceeding.

CONCLUSION.

46. This was not a trial. The defendant's contention that the plea was not knowingly or voluntary entered is contrary to the record which clearly indicates in the Defendant's own words, to the judge in open court during the proceeding, that he knowing and voluntarily entered the agreement. The rest of the record is consistent in supporting the same conclusion. The petitioner's contentions that his counsel was ineffective are void of factual basis.

47. The record indicates that the petitioner's Claims are not valid and that his Petition for Writ of Habeas Corpus should be denied without further proceedings.

IT IS SO ORDERED.

S/_____
Mark A. Macaron, District Judge
Division 9

No_____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

JOHN L. SALAZAR PRO SE- PETITIONER

VS.

TIME LEMASTER-RESPONDENT

PROOF OF SERVICE

I, John L. Salazar, do swear or declare that on this date, May 20, 2005, as required by supreme Court rule 29 I have and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding and envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows: Arthur W. Pepin Assistant Attorney General, P.O. Drawer 1508, Santa Fe, N.M. 87504.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 20, 2005

_____

John L. Salazar, pro se